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SUPREME COURT OF TH

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STANLEY V.
Petitio

VS.

BANK ONE, TEXAS, N.A
Insurance Bridge B
Assignee of the Fe
Insurance Corporati
for MBank Dallas
FEDERAL DEPOSIT INSUR
as Receiver for MBa
Respond

Petition for Writ o
the United States C
for the Fift

APPEND

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1601 El
Dallas,
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ATTORNE
STANLEY

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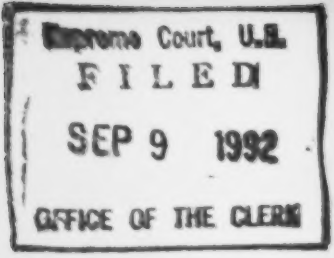

UNITED STATES

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GRAFF,
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(f/k/a Deposit
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, N.A., and
NCE CORPORATION,
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Certiorari to
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Circuit

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Texas 75201-4713
53-0000
53-1933 - FAX

YS FOR PETITIONER
V. GRAFF

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EXHIBIT A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 91-1887

BANK ONE, TEXAS, N.A. (f/k/a DEPOSIT INSURANCE BRIDGE BANK, N.A.) as Assignee of the FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for MBANK DALLAS, N.A., ET AL.

Plaintiffs-Appellees,

VERSUS

STANLEY V. GRAFF,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas (CA3-89-2376-F)

Before GARWOOD, and DeMOSS, Circuit Judges, and SCHWARTZ, District Judge.[1]

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[1] Senior District Judge for the

DeMOSS, Circuit Judge:[2]

I. FACTS AND PROCEDURAL HISTORY

Stanley Graff executed a note to finance a real estate purchase in the amount of $4,050,000 in favor of M-Bank in April of 1985. The note was subsequently renewed, modified, and

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Eastern District of Louisiana, sitting by designation.

[2] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public ad burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

extended through a series of agreements between M-Bank and Graff. Graff defaulted on the note, and M-Bank filed suit in state court seeking recovery of the balance due. In March of 1989, M-Bank was declared insolvent and the FDIC was appointed as its receiver. That same month, Bank One acquired the Graff note through a purchase and assumption agreement with the FDIC, as receiver for M-Bank, and intervened in the state court action. Graff filed an answer, counter-claim, and third-party petition against Bank One and the FDIC, as receiver for M-Bank. In his answer Graff asserted the affirmative defenses of waiver and estoppel. In his counter-claim and third-party petition he alleged violations of the Fair Debt Collection

Practices Act (FDCPA), common law unfair debt collection practices, and the Texas Deceptive Trade Practices Act (DTPA). The state court granted an interlocutory summary judgment for Bank One allowing recovery on the note, but did not dispose of Graff's claims. In September of 1989, the FDIC and Bank One removed the state court action to the United States District Court for the Northern District of Texas, Dallas Division. After removal, the FDIC and Bank One moved for summary judgment on Graff's claims, and the district court granted such motion. In July of 1991, the district court entered a final judgment and amended final judgment, adopting and finalizing both the interlocutory summary judgment allowing recovery on the note, and the

interlocutory summary judgment dismissing Graff's claims against Bank One and the FDIC. Graff appeals that judgment.

II. ANALYSIS

A. Affirmative Defenses

Graff contends that the district court erred in allowing Bank One to recover accrued interest on the promissory note because his affirmative defenses of waiver and estoppel bar recovery. Specifically, he alleges that he attempted to pay interest on the note, but that M-Bank representatives expressly instructed him not to pay such interest. By virtue of that instruction, Graff contends that M-Bank intentionally engaged in conduct that was inconsistent with its right to claim interest, and

thus waived its right to seek any interest due under the note. Graff also contends that M-Bank's same conduct equitable estops it from asserting its right to collect interest.

On the other hand, Bank One argues that Graff's defenses are barred both by the Supreme Court's opinion in D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942), and 12 U.S.C. § 1821(n)(4)(I). In D'Oench, as a defense to a collection suit, the borrower claimed that he had agreed with the failed bank that suit would not be brought to collect on a note. The Court barred the borrower from asserting that defense as a matter of public policy to protect the FDIC from misstatements regarding the genuineness of a bank's assets, and to prevent a bank

from padding its assets with spurious notes. The Court essentially held that a person dealing with an FDIC insured institution could not assert a claim or defense against the FDIC based on a secret side agreement with the bank if he lent himself, no matter how innocently, to a scheme which mislead the FDIC's examiners regarding the worth of the bank's assets.[3] See also Bowen v. FDIC,

---

[3] Graff argues that even if the FDIC can avail itself of D'Oench, Bank One cannot do so. The applicable case law says otherwise. This court has held on numerous occasions that bridge banks and transferees from the FDIC may assert the defenses of D'Oench. FSLIC v. Griffin, 935 F.2d 692, cert. denied 112

915 F.2d 1013, 1016 (5th Cir. 1990) (application of the D'Oench holding is not dependent upon either the illegality of the unrecorded agreement or the fraudulent intent or bad faith of the borrower). Following the court's lead in D'Oench, Congress enacted 12 U.S.C. § 1821(n)(4)(I) (1990), which provides in pertinent part that a suit against a bridge bank based on an agreement that

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S.Ct. 1163 (1992); Bell & Murphy and Assoc., Inc. v. InterFirst Bank Gateway, 894 F.2d 750, 754 (5th Cir.), cert. denied, 111 S.Ct. 244 (1990). Consequently, Bank One, which acquired the note from the FDIC, as receiver for M-Bank, is entitled to the protections of D'Oench.

diminishes the bridge bank's interest in an asset acquired from a failed bank must (1) be in writing; (2) executed by the bank contemporaneously with the bank's acquisition of the asset; (3) approved by the board of directors or loan committee; and (4) from its inception have been an official bank record.

Graff's contention that his defenses of waiver and estoppel bar Bank One's recovery of interest due on the note is based on his assertion that M-Bank representatives expressly instructed him not to pay interest. If his contention is true, by agreeing not to pay interest, Graff lent himself to a scheme that mislead the FDIC and Bank One regarding the worth of the note held by M-Bank, because a note without interest is less

valuable than a note with interest. The alleged agreement to forego interest was not recorded, and there was no way for FDIC examiners to determine the existence of such an agreement. Accordingly, the principles of D'Oench bar Graff from asserting the alleged agreement as a defense to Bank One's recovery of interest due on the note. Likewise, § 1821(n)(4)(I) bars Graff from asserting the alleged agreement as a defense to recovery. The alleged agreement was not in writing, was not executed contemporaneously with M-Bank's acquisition of the note, was not approved by M-Bank's board of directors or loan committee, and from its inception was not an official M-Bank record. Simply put, the principles of D'Oench, Duhme, and 12

U.S.C. § 1821(n)(4)(I) bar Graff's affirmative defenses of waiver and estoppel to payment of the interest due on the note based on his oral and unrecorded agreement with M-Bank representatives.

B. Graff's Counter-Claims

1. Fair Debt Collection Practices Act

Graff contends that the district court erred in granting summary judgment to Bank One[4] and FDIC for his claims

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[4] Graff contends that Bank One is liable for M-Bank's alleged attempts to collect from his father. That contention is without merit. Bank One did not acquire those type of liabilities from the FDIC, as receiver of M-Bank, in the

under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, et. seq. (FDCPA). Specifically, Graff alleges that he saw M-Bank personnel in his father's office and that his father told him that they attempted to pressure him into paying the amount due on the note. By communicating with his father, Graff contends that M-Bank violated the act, which essentially prohibits a debt collector from

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March, 1989 purchase agreement. Consequently, Bank One is not a proper party to Graff's claims for violations of common law unfair debt collection practices, the DTPA, or the FDCPA. Graff's alleged claims can lie, if at all, only against the FDIC, as receiver for M-Bank.

contacting a debtor's relatives or other third persons not liable as debtors or guarantors regarding payment of a debt.

Graff's contention is without merit. To assert a violation under the act the debtor must show that in connection with the collection of: (1) a debt; (2) a debt collector; (3) communicated with a person other than the debtor; and (4) the debtor suffered actual damages. See 15 U.S.C. § 1692c(b) and § 1692 K(a)(1)(2).

The act defines a "debt collector" as one "who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due <u>another</u>." 15 U.S.C. § 1692a(6) (emphasis added). At the time M-Bank allegedly attempted to collect the amount due on the note from Graff's

father, it was attempting to collect as the owner of the note. One attempting to collect a debt owed to itself is not a "debt collector" under the Act. See Howe v. Readers Digest Ass'n Inc., 686 F. Supp. 461, 466-67 (S.D.N.Y. 1988). Since M-Bank was not a "debt collector," Graff's allegation fails to state facts sufficient to meet the requirements to bring suit under the act.

2. Common Law Unfair Debt Collection Practices

Graff contends that M-Bank personnel committed common law unfair debt collection practices by attempting to have Graff's father pay the amount due on the note. The only analogous cause of action under Texas law is a cause of action for unreasonable collection

efforts. To state a claim under this tort the borrower must show that the creditor attempted to collect a debt by waging a "campaign" of harassment and intimidation. Ware v. Paxton, 359 S.W.2d 897, 900 (Tex. 1962). Accordingly, trivial and isolated incidents are insufficient to allege a violation of the tort. But, the louder, nastier, more insulting, more threatening, and more offensive the creditor's actions are, the more likely it is that the court will find that the creditors' actions were unreasonable. See 46 Tex. L. Rev. 950, 959-60 (1968).

The only support for Graff's contention that M-Bank engaged in unreasonable collection efforts are his statements in his affidavit attached to

his motion opposing summary judgment. In that affidavit he stated: (1) that his father informed him that M-Bank personnel had threatened his father with legal action to pressure him into paying the debt; and (2) that he saw M-Bank personnel meeting with his father in his father's office.

An affidavit opposing a motion for summary judgment is required by Federal Rule of Civil Procedure 56(e) to set forth facts that would be admissible in evidence. See Buchanan v. Stanships, Inc., 744 F.2d 1070, 1073 (5th Cir. 1984). Hearsay statements in such affidavits are not entitled to be given any evidentiary weight by the court. Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539 (5th Cir. 1980), cert.

denied, 454 U.S. 927 (1981). The statement that Graff attributes to his father regarding M-Bank personnel attempting to pressure his father to pay the debt is hearsay under Federal Rule of Evidence 801(c) and is inadmissible to prove the truth of the matter asserted. Thus, disregarding Graff's hearsay affidavit testimony, the only evidence that remains for the court to consider regarding Graff's unreasonable collection efforts claim is his statement that he saw M-Bank personnel in his father's office. Assuming the truth of that statement, we have no evidence that the M-Bank personnel were attempting to collect the debt from his father, much less that they were unreasonably attempting to do so. Simply put, the

competent evidence tendered by Graff does not allege acts on the part of M-Bank personnel that rise to the level sufficient to state a claim under Texas common law for unreasonable collection efforts.[5]

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[5] Graff also asserts that M-Bank personnel violated the DTPA by attempting to collect the amount due on the note from his father. The lack of competent evidence tendered by Graff barring him from stating a claim for common law unfair debt collection practices, likewise bars him from stating a claim for DTPA violations.

III. CONCLUSION

For all of the above and foregoing reasons, the judgment of the district court is AFFIRMED.

EXHIBIT B

No. 89-481-D

DEPOSIT INSURANCE BRIDGE BANK, N.A. as Assignee of the FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver for MBANK DALLAS, N.A., Plaintiff,

VS.

STANLEY V. GRAFF, Defendant.

In the 95th Judicial District Court of Dallas County, Texas

INTERLOCUTORY SUMMARY JUDGMENT

On this day came on to be considered Plaintiff's Motion for Summary Judgment (the "Motion"), filed by Plaintiff Bank One Texas, N.A. (formerly known as Deposit Insurance Bridge Bank, N.A.) ("Bank One"), as Assignee of the Federal Deposit Insurance Corporation, as Receiver for MBank Dallas, N.A., in the

above-entitled and numbered cause. The Motion was filed on July 27, 1989 and the hearing was set for September 15, 1989. Defendant Stanley V. Graff ("Graff") timely filed his First Amended Original Answer, Original Counterclaim and Third-Party Petition and the matters asserted therein are before this Court. Although Graff timely received a copy of the Motion, he failed to file a response in a timely fashion. However, the Court granted leave for Graff to file his response and supporting affidavit. The Court, having reviewed the Motion, Brief in Support of Motion for Summary Judgment, the Affidavits of Ron Tomlin and William Frank Carroll, the Response and Affidavit of Graff and the other pleadings on file, and having considered

the law and the facts, is of the opinion that Bank One's Motion for Summary Judgment was made in the proper form and at the proper time, with proper service having been made, and further finds that the summary judgment evidence shows the absence of any genuine issue as to any material fact on the matters asserted in Plaintiff's Motion and that Bank One is entitled to judgment as a matter of law on the issues expressly set out in the Motion, and finds, pursuant to Tex. R. Civ. P. 166a, that Bank One's Motion for Summary Judgment should be granted in its entirety.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that Bank One's Motion for Summary Judgment be, and the same is hereby GRANTED and it is ADJUDGED that

Bank One recover from Defendant Stanley V. Graff the principal sum of $4,022,738.00 together with accrued but unpaid interest on such sum in the amount of $638,645.62 as of September 15, 1989;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Bank One shall recover from Defendant Stanley V. Graff its reasonable attorneys' fees in the amount of $8,250.00;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that if this judgment is appealed by Graff to the Court of Appeals, Bank One shall recover from Graff reasonable and necessary attorneys' fees in the amount of $7,500.00;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that if Graff files an application for writ of error to the

Texas Supreme Court, on this judgment, Bank One shall recover from Graff reasonable and necessary attorneys' fees in the amount of $3,500.00;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that if the application for writ of error is granted, but this judgment affirmed by the Texas Supreme Court, Bank One shall recover from Graff reasonable and necessary attorneys' fees in the amount of $2,500.00;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that costs of court are hereby awarded to Bank One;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that all sums awarded herein from the date of judgment until paid, including court costs, shall bear interest in favor of Bank One at the

maximum legal rate of ten percent (10%) per annum;

IT IS FURTHER ORDERED that still pending before this Court and part of this cause are the issues presented in Defendant Graff's Counterclaim and Third-Party Petition. The Court specifically finds that the matters raised therein were not raised in Plaintiff's motion and are likewise not addressed by this Judgment.

IT IS FURTHER ORDERED that upon this Judgment becoming final that Bank One have all writs of execution and other process necessary to enforce and collect this Judgment.

SIGNED this 18th day of September, 1989.

_____
David K. Brooks
JUDGE PRESIDING

JUDGE 191ST JUDICIAL
DISTRICT COURT SITTING
FOR JUDGE 95TH JUDICIAL
DISTRICT COURT OF DALLAS
COUNTY, TEXAS

APPROVED AS TO FORM:

BAKER, MILLS & GLAST, P.C.
500 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201-2916
(214) 220-8200

By: _____
William Frank Carroll
Bruce Collins

ATTORNEYS FOR PLAINTIFF

KOLODEY & THOMAS
2300 Thanksgiving Tower
1601 Elm Street
Dallas, Texas 75201-4713
(214) 953-0000

By: _____
Lindsey Vinson

ATTORNEYS FOR DEFENDANT

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DEPOSIT INSURANCE BRIDGE BANK, N.A., AS ASSIGNEE OF THE FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MBANK DALLAS, N.A., AND FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MBANK DALLAS, N.A.,
Plaintiffs,

VS.

STANLEY V. GRAFF,
Defendant.

CIVIL ACTION NO. CA 3-89-2376-F

FINAL JUDGMENT

On this day came on for consideration the above referenced matter wherein BANK ONE, TEXAS, N.A. ("BANK ONE") (f/k/a DEPOSIT INSURANCE BRIDGE BANK, N.A.) and FEDERAL DEPOSIT INSURANCE CORPORATION ("FDIC"), are Plaintiffs and

Counter-Defendants and STANLEY V. GRAFF ("GRAFF") is Defendant and Counter-Plaintiff.

The Court has considered the evidence, the pleadings, affidavits, and official records in this cause, and finds that BANK ONE and FDIC are entitled to judgment against GRAFF. It is therefore

ORDERED that the Interlocutory Judgment entered by the 95th Judicial District Court of Dallas County, Texas on September 18, 1989 is hereby adopted by this Court and made final, such that BANK ONE recover from GRAFF judgment in the principal amount of $4,022,738.00 and interest to the date of judgment in the amount of $1,486,758.47;

IT IS FURTHER ORDERED that BANK ONE shall recover from GRAFF its reasonable

attorneys' fees in the amount of $16,612.00;

IT IS FURTHER ORDERED that all claims asserted by GRAFF in his First Amended Original Answer, Original Petition and Third-Party Petition against FDIC and BANK ONE are hereby dismissed with prejudice;

IT IS FURTHER ORDERED that all sums awarded herein from the date of judgment until paid, including court costs, shall bear interest in favor of BANK ONE at the rate of _____ percent per annum;

IT IS FURTHER ORDERED that all costs of court are hereby awarded to BANK ONE and FDIC; and

IT IS FURTHER ORDERED that BANK ONE shall have all writs of execution and

other process necessary to enforce this judgment when it becomes final.

SIGNED this 23rd day of July, 1991.

_____

UNITED STATES DISTRICT JUDGE

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DEPOSIT INSURANCE BRIDGE BANK, N.A., AS ASSIGNEE OF THE FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MBANK DALLAS, N.A., AND FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MBANK DALLAS, N.A.,
Plaintiffs,

VS.

STANLEY V. GRAFF,
Defendant.

CIVIL ACTION NO. CA 3-89-2376-F

AMENDED FINAL JUDGMENT

By order dated July 23, 1991, the Court entered Final Judgment in the above-styled and numbered case. The amount of post-judgment interest was inadvertently omitted from the court's order. Accordingly, the Court, sua

sponte, amends said Final Judgment as follows:

> All sums awarded herein from the date of judgment until paid, including court costs, shall bear interest in favor of Bank One at the rate of 6.39% per annum.

All other provisions of the Final Judgment entered herein on July 23, 1991, remain in full effect.

IT IS SO ORDERED this 26th day of July, 1991.

ROBERT W. PORTER
SENIOR UNITED STATES
DISTRICT JUDGE

EXHIBIT E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1887

BANK ONE, TEXAS, N.A., (f/k/a DEPOSIT INSURANCE BRIDGE BANK, N.A.), as Assignee of the FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for MBANK DALLAS, N.A., ET AL,
Plaintiffs-Appellees,

versus

STANLEY V. GRAFF,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING

(June 11, 1992)

Before GARWOOD, and DeMOSS, Circuit Judges, and SCHWARTZ, District Judge.[6]

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

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[6] Senior District Judge for the Eastern District of Louisiana, sitting by designation.

EXHIBIT F

No. 89-481-D

DEPOSIT INSURANCE BRIDGE BANK, N.A. as Assignee of the FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver for MBANK DALLAS, N.A., Plaintiff,

VS.

STANLEY V. GRAFF, Defendant.

In the 95th Judicial District Court of Dallas County, Texas

FIRST AMENDED ORIGINAL ANSWER, ORIGINAL COUNTERCLAIM AND THIRD-PARTY PETITION

Defendant Stanley V. Graff ("Graff") files this first amended original answer, original counterclaim and third-party petition as follows:

Original Answer

General Denial

1. Graff denies each and every, all and singular, the allegations

contained in Plaintiff's Original Petition and demands strict proof thereof.

Affirmative Defenses

2. Plaintiff has waived its right to seek all amounts allegedly due under the promissory note at issue in this litigation or at least has waived its right to seek all interest due under the promissory note at issue in this litigation.

3. By its conduct and the conduct of its assignor, Plaintiff is equitably estopped from recovering all amounts allegedly due under the promissory note or at the least recovery of all interest allegedly due under the promissory note at issue in this litigation.

Counterclaim

Count One - Unfair Debt Collection Practices

4. The conduct of Plaintiff and/or the conduct of Plaintiff's assignor, specifically Plaintiff's and Plaintiff's assignor's contact with relatives and others not liable as debtors or guarantors on this debt concerning the alleged indebtedness and the financial condition of Graff, constitutes statutory and common law unfair debt collection practices and have proximately caused Graff damage in excess of the minimum jurisdictional limits of this Court for which Graff now sues.

Count Two - Deceptive Trade Practices

5. The conduct of Plaintiff and/or the conduct of Plaintiff's assignor,

specifically Plaintiff's and Plaintiff's assignor's contact with relatives and others not liable as debtors or guarantors on this debt concerning the alleged indebtedness and the financial condition of Graff, violates the Texas Deceptive Trade Practices Act, Section 17.41, et seq., by at least:

5.01 Plaintiff's use or employment of false, misleading or deceptive acts or practices proscribed in Section 17.46 of the Act including, but not limited to the following:

(a) By representing the agreements conferred or involved rights, remedies or obligations which they did not have or involve;

(b) By failing to disclose information concerning goods or services at the time of the transaction, such failure being intended to induce Graff into a transaction into which Graff would not have entered into had the information been disclosed;

5.02 Plaintiff has engaged in an unconscionable course of action.

Count Three - Attorneys' Fees

6. As a result of the conduct of Plaintiff as described above, it has been necessary for Graff to retain the services of the undersigned attorneys to prosecute this counterclaim. Pursuant to the Deceptive Trade Practices Act, Graff is entitled to recover his reasonable and

necessary attorneys' fees for the services rendered for which he now sues.

Third-Party Petition

Graff, as third-party Plaintiff, files this third-party petition complaining of the Federal Deposit Insurance Corporation, as Receiver for MBank Dallas, N.A. ("FDIC) as follows:

Count One - Unfair Collection Practices

7. The conduct of FDIC and/or of MBank Dallas, N.A., specifically contacting relatives and others not liable as debtors or guarantors on this debt concerning the alleged indebtedness and the financial condition of Graff, constitutes statutory and common law unfair debt collection practices and have proximately caused Graff damage in excess

of the minimum jurisdictional limits of this Court for which Graff now sues.

Count Two - Deceptive Trade Practices

8. The conduct of the FDIC and/or MBank Dallas, N.A., specifically contacting relatives and others not liable as debtors or guarantors on this debt concerning the alleged indebtedness and the financial condition of Graff, violates the Texas Deceptive Trade Practices Act, Section 17.41, et seq., by at least:

8.01 The use or employment of false, misleading or deceptive acts or practices proscribed in Section 17.46 of the Act including, but not limited to the following:

(a) By representing the agreements conferred or involved rights, remedies or obligations which they did not have or involve;

(b) By failing to disclose information concerning goods or services at the time of the transaction, such failure being intended to induce Graff into a transaction into which Graff would not have entered into had the information been disclosed;

8.02 The conduct constitutes an unconscionable course of action.

Count Three - Attorneys' Fees

9. As a result of the conduct as described above, it has been necessary

for Graff to retain the services of the undersigned attorneys to prosecute this counterclaim. Pursuant to the Deceptive Trade Practices Act, Graff is entitled to recover his reasonable and necessary attorneys' fees for the services rendered for which he now sues.

Prayer for Relief

WHEREFORE, Graff prays for relief as follows:

1. That Plaintiff take nothing by reason of its suit against Graff;

2. That Graff be awarded damages against Plaintiff as alleged in his counterclaim;

3. That Graff be awarded his damages against the FDIC as alleged in his third-party petition;

4. For attorneys' fees;

5. For costs of court; and

6. For such other and further relief, both general and special, at law and in equity, to which he may show himself entitled.

Respectfully submitted,

KOLODEY & THOMAS
2300 Thanksgiving Tower
1601 Elm Street
Dallas, Texas 75201-4713
(214) 53-0000

By: _____
Lindsey Vinson
TX Bar No. 20590400

ATTORNEYS FOR
STANLEY V. GRAFF

Certificate of Service

This is to certify that a true and correct copy of the foregoing instrument was forwarded in the United States Mail, postage prepaid, to William Frank Carroll, Baker, Mills & Glast, P.C., 500 Trammell Crow Center, 2001 Ross Avenue, Dallas, Texas 75201-2916 on this 1st day of September, 1989.

_____

Lindsey Vinson

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DEPOSIT INSURANCE BRIDGE BANK, N.A., AS ASSIGNEE OF THE FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MBANK DALLAS, N.A., AND FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MBANK DALLAS, N.A.,
Plaintiffs,

VS.

STANLEY V. GRAFF,
Defendant.

CIVIL ACTION NO. CA 3-89-2376-F

MEMORANDUM OPINION AND ORDER GRANTING SUMMARY JUDGMENT

This is a suit to collect on a promissory note. Before the Court is the plaintiffs' motion for summary judgment, filed on May 1, 1990, wherein plaintiffs

Bank One, Texas, N.A. ("Bank One"),[7] formerly known as the Deposit Insurance Bridge Bank, N.A. ("Bridge Bank"),[8] and the Federal Deposit Insurance Corporation ("FDIC"), as Receiver of MBank Dallas, N.A. ("MBank"), move the Court for a summary disposition of all claims asserted by the defendant Stanley V. Graff ("Graff") in his First Amended Original Answer, Original Counterclaim

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[7] Bank One acts, in this lawsuit, in its capacity as assignee of the FDIC as Receiver for MBank Dallas, N.A.

[8] Effective July 12, 1989, the name of Bridge Bank was changed to Bank One. The Notice of this name change was filed in the state court action, before removal to federal court.

and Third Party Petition. After careful review of the arguments, authorities, and affidavits presented by the parties, the Court is of the opinion that the plaintiffs' motion should be in all things GRANTED.

FACT SUMMARY

On January 11, 1989, MBank filed its original petition in the 95th Judicial District Court of Dallas County, Texas, seeking recovery on a certain deed of trust promissory note (the "note") executed by Stanley V. Graff in favor of MBank Grand Prairie on April 22, 1985, in the amount of four million fifty thousand dollars ($4,050,000.00).[9] The note was

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[9] The promissory note upon which the plaintiffs sue is a negotiable

instrument under Texas law. Recovery on such an instrument is governed by TEX. BUS. & COMM. CODE ANN. section 3.307(b) (Vernon 1968). Under section 3.307(b), the plaintiffs must prove that (1) the note was executed by Graff; (2) Bank One is the present holder of the note; and (3) that the note has been introduced into evidence. See, e.g., Anderson v. Industrial State Bank, 478 S.W.2d 215. 217 (Tex. Civ. App. - Houston [14th Dist.] 1972, writ ref'd n.r.e.).

Additionally, the Court notes that pursuant to TEX. BUS. & COMM. CODE ANN. section 3.307(a) (Vernon 1968), Texas law deems each signature on an instrument admitted, unless specifically denied. Graff has not specifically

for business purposes, and not for personal, family, or household purposes.

Although originally for a two-year term, the note was repeatedly renewed and extended through approximately July of 1988, by way of a series of 90-day notes.[10] In June of 1988, Graff met with MBank personnel concerning the continuing 90-day extensions of his debt. Bank personnel requested additional collateral from Graff. No mutually satisfactory resolution of the matter of Graff's indebtedness could be reached between Graff and MBank.

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denied his signature on the note.

[10] See Modification and Extension of Real Estate Note and Lien, dated May 20, 1988, executed by Stanley V. Graff.

On March 28, 1989, the Comptroller of the Currency declared MBank to be insolvent, closed MBank pursuant to Title 12 U.S.C. sections 191 and 1821(c), and appointed the FDIC as Receiver for MBank and the Bridge Bank (later Bank One) entered into a Purchase and Assumption Agreement whereby all loans of the MBank Receivership, and selected liabilities of the MBank Receivership, were transferred to the Bridge Bank, including Graff's note. Under Article II of the Purchase and Assumption Agreement, the liabilities arising from claims based on the actions of the failed MBank or its employees were not assumed by the Bridge Bank but, rather, retained by the FDIC as Receiver for MBank.

Before removal to federal court, the state trial court granted an Interlocutory Summary Judgment in favor of Bank One on the note. The Interlocutory Judgment did not dispose of Graff's counterclaims for unfair debt collection practices, violations of the Texas Deceptive Trade Practices Act and attorneys' fees.

STANDARD FOR THE GRANTING OF SUMMARY JUDGMENT

The standard for the granting or denial of a motion for summary judgment is well-settled and need not be reiterated here at length. The party seeking summary judgment always bears the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2553 (1986); Reese v. Anderson, 926 F.2d 494, 498 (5th Cir. 1991).

The district court should grant the movant's motion for summary judgment if it determines that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P.56(c). A material fact is one that might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106

S.Ct. 2505 (1986). In the present case, the doctrine of D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942), makes clear that the fact issues raised by Graff are not material.

COMPETENCY OF THE AFFIDAVITS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The affidavits of David Eisenstark,[11] Ron Tomlin,[12] and Wilton

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[11] David Eisenstark is employed by the FDIC in the capacity of bank Liquidation Specialist. His job entails administrative responsibilities pertaining to claims and litigation against the FDIC as Receiver of MBank, Dallas N.A.

[12] Ron Tomlin is employed by Bonnet Resources Corporation, as Agent for Bank One, Texas, N.A. formerly known as Deposit Insurance Bridge Bank, N.A.,

D. Page[13] support the Plaintiffs' Motion for Summary Judgment. Graff challenges the competency of the affidavits as summary judgment evidence contending that each is substantially deficient because it contains conclusory assertions of personal knowledge. The Court rejects

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Assignee of the FDIC, as Receiver for MBank, Dallas, N.A. as a Senior Vice-President. Tomlin held this same position with Bank One and MBank Dallas, N.A. (successor to MBank Grand Prairie).

[13] Wilton D. Page is employed by Bank One, Texas, N.A., formerly known as Deposit Insurance Bridge Bank, N.A., Assignee of the FDIC, as Receiver for MBank, Dallas, N.A., as a cashier. Page held this same position with Bank One's predecessor in interest, MBank, Dallas, N.A., (successor to MBank Grand Prairie).

this argument. The Court finds the affidavits of David Eisenstark, Ron Tomlin, and Wilton D. Page to be competent evidence within the meaning of Laborers' International Union v. United States Department of Justice, 578 F.Supp. 52, 56 (D.C. D.C. 1983) aff'd without opinion, 748 F.2d 714 (D.C. Cir. 1984).

GRAFF'S COUNTERCLAIMS

Graff alleges that the conduct of the FDIC and Bank One in contacting Graff's relatives, and others not liable as debtors or guarantors on Graff's debt, constitutes unfair debt collection practices.[14] He further alleges

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[14] Specifically, Graff contends that representatives of MBank approached his father regarding paying off Graff's

violations of the Texas Deceptive Trade Practices Act, Sec. 17.41 et seq., by the plaintiffs and seeks attorney fees on his counterclaims.

I. Unfair Debt Collection Practices: Graff's Statutory and Common Law Claims and the Application of the Doctrine of D'Oench, Duhme & Co. to the Present Case

In his counterclaim, Graff asserts claims against the FDIC and Bank One for "statutory and common law unfair debt

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debt. (Affidavit of Stanley V. Graff in Opposing Motion for Summary Judgment, page 3). The plaintiffs deny that they contacted Graff's relatives, or anyone else not liable on that note, regarding Graff's indebtedness. The Court declines to strike the Graff affidavit from the summary judgment papers before it.

collection practices." While Graff has failed to specify the statutory provisions under which he seeks relief, it appears that Graff has attempted to state a statutory claim for unfair debt collection practices under the "Fair Debt Collection Practices Act," Title 15 U.S.C., section 1692. The Court finds that Graff has failed to properly state such a claim.

Even if Graff had properly stated such a statutory claim, his recovery under this statute would be barred because the purpose for which the loan was made to Graff is outside the scope of the statute. It is undisputed that the loan made to Graff was for business purposes, and not for personal, family, or household purposes, and thus does not

constitute a "debt" within the meaning of Title 15 U.S.C. section 1692a(5). Thus, any claim by Graff asserting a violation of Title 15 U.S.C., section 1692 is barred.

In evaluating Graff's "common law" counterclaim for unfair debt collection practices, the Court must examine the applicability of the D'Oench, Duhme doctrine to this case. The D'Oench, Duhme doctrine is a rule of estoppel that prevents those who give notes to federally-insured institutions from raising defenses based on alleged side agreements made with the officers of failed banks with regard to enforceability of promissory notes. See FSLIC v. Murray, 853 F.2d 1251, 1255 (5th Cir. 1988). The rationale underlying the

doctrine is that federal banking authorities must be able to enforce notes in accordance with their written terms, even in the face of wrongdoing by a failed bank, in order to ensure the smooth administration of bank insurance and to avoid panic. See e.g., Langley v. FDIC, 484 U.S. 36, 91 (1987); FSLIV v. Hsi, 657 F.Supp. 1333, 1338 (E.D. La. 1986).

The D'Oench, Duhme doctrine has been extended beyond the limited situation in which the lender and borrower secretly agree that an obligation will not be enforced. It has been used to bar nearly every defense raised by the maker of a note against the FDIC and the FSLIC. See e.g., FSLIC v. Murray, 853 F.2d 1251, 1255 (5th Cir. 1988) (barring the defense

of fraud); FSLIC v. Lafayette Investment Properties, Inc., 855 F.2d 196, 198 (5th Cir. 1988) (barring the defense of fraud; FDIC v. McClanahan, 795 F.2d 512, 516-17 (5th Cir. 1986) (barring the defense of failure of consideration or fraud in the inducement); FDIC v. Investors Associates X., Ltd., 775 F.2d 152, 155 (6th Cir. 1985) (barring all defenses arising out of fraudulent scheme); FDIC v. Van Laanen, 769 F.2d 666, 667 (10th Cir. 1985) (barring oral side agreements); FDIC v. Vestring, 620 F.Supp. 1271, 1273-74 (D.C. Kan. 1985) (barring fraud in the inducement).

While a genuine, disputed issue of fact is presented in this case regarding whether MBank personnel engaged in unfair debt collection practices, the Court

concludes, in light of the case law discussed above, that this fact issue is immaterial under the applicable law. Even if proven, Graff's claim of unfair debt collection practices by the plaintiffs is barred as a defense to his liability on the note by D'Oench, Duhme and its progeny.

II. Graff's Counterclaim for Violations of the Texas Deceptive Trade Practices Act

To recover under the Texas Deceptive Trade Practices Act ("DTPA"), the plaintiff must be a consumer, as defined by the DTPA, who procured a good or service, as defined by the DTPA. TEX. BUS. & COMM. CODE ANN. sections 17.45(1), 17.45(2) (Vernon 1987). The loaning of money is not a "service" within the meaning of the DTPA. See e.g., Riverside

Nat'l Bank v. Lewis, 603 S.W.2d 169, 174-5 (Tex. 1980). Because Graff is not a consumer within the meaning of the DTPA, he lacks standing to assert this counterclaim.

III. Graff's Claim for Attorneys' Fees Incurred in the Prosecution of his Counterclaims

Graff seeks attorneys' fees on his counterclaims against the FDIC and Bank One. Under the reasoning and analysis of Judge Edith Jones as set forth in Interfirst Bank Abilene, N.A. v. Federal Deposit Insurance Corporation, 777 F.2d 1092, 1097 (5th Cir. 1985), the Court rejects Gaff's request for attorneys' fees because the claimed fees "run afoul of the requirement that the assets of a failed bank be ratably distributed among the bank's creditors holding approved or

adjudicated claims." See also Title 12 U.S.C. section 194.

In sum, the plaintiffs have met their summary judgment burden of proof and Graff has failed to produce evidence that a genuine issue of material fact exists requiring resolution by the fact-finder. Accordingly, the Court concludes that this case is appropriate for disposition by summary judgment.

Plaintiffs have established that Graff executed the note,[15] that Graff has failed to pay the note according to its terms, that Bank One is the holder, owner, and possessor of the note, and is

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[15] See page 4, paragraph 6 of the parties' Joint Pretrial Order, filed June 4, 1990.

entitled to judgment, including reasonable attorneys' fees, costs of court and post-judgment interest. Accordingly, Plaintiffs' motion for Summary Judgment of May 1, 1990 is GRANTED.

By separate order, a final judgment shall be entered against Graff and in favor of the FDIC and Bank One on all claims asserted by Graff in his First Amended Original Answer, Original Counterclaim and Third Party Petition. In addition, the previous Interlocutory Judgment granted by the 95th Judicial District Court, Dallas County, Texas, Cause No. 89-481-D, against Graff and in favor of Bank One, shall be made final. The Court declines to award prospective attorneys' fees with regard to any appeal

to the Fifth Circuit, or to the Supreme Court, of its judgment in this case.

The plaintiffs shall, within fifteen (15) days of the file-stamped date of this order, submit a proposed final judgment to the Court, including affidavits in support of the amounts claimed in attorneys' fees for the prosecution of this suit.

The merits of this case having been decided, the above-styled and numbered cause is hereby **ADMINISTRATIVELY CLOSED** and removed from this Court's docket of pending cases.

SO ORDERED this 18th day of June, 1991.

ROBERT W. PORTER
SENIOR UNITED STATES
DISTRICT JUDGE